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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1/]

The American Association of Retired Persons (AARP), a nonprofit membership organization of more than 30 million Americans age 50 or older, is dedicated to addressing the

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[1/] No counsel for any party authored any portion of this brief. No persons other than AARP, its members, or its counsel have made a monetary contribution to the preparation and submission of this brief. Some of the petitioners, including Mr. Sprague, are AARP members and pay AARP membership dues.

needs and interests of older workers and retirees. Approximately sixteen million AARP members are under age sixty-five, and generally not eligible for Medicare. Many of AARP's members, working and retired, are participants and beneficiaries in employer-sponsored benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*[2/]

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens. In the effort to promote independence, AARP works to foster the health and economic security of individuals as they age by attempting to ensure the availability of quality and economical health coverage, from both public and private sources.

Health care coverage is essential to adequate medical care in this country. AARP members are greatly concerned that they have adequate health care coverage, especially in the event of hospitalization, long-term disability or catastrophic illness. Pre-existing medical conditions and exorbitant costs pose significant barriers to AARP members in obtaining such coverage.

When employer-provided retiree health coverage is eliminated or reduced, notwithstanding corporate representations to the contrary, it may be virtually impossible for a retiree to obtain comparable and affordable coverage elsewhere. Since a number of illnesses which require

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[2/] To ensure, to the greatest extent possible, the availability of health coverage under employer-sponsored benefit plans, AARP has participated as *amicus curiae* in numerous cases involving ERISA, including *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 117 S.Ct. 1513 (1997); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

extensive treatment occur more frequently in the older population, AARP members and others face significant risks when an employer breaches its promise of continued health benefits during retirement.

Because elimination or reduction of retiree health benefits has a direct bearing on the economic and health security of millions of Americans, including AARP members, AARP is vitally interested in ensuring that employer promises for lifetime health care benefits are enforceable under ERISA and, further, that bilateral contracts providing for enhanced benefits are enforceable.[3/]

REASONS FOR GRANTING THE WRIT

In addition to the substantial conflict between the circuits on the questions presented by petitioners, a writ of *certiorari* is appropriate because the Sixth Circuit decision upsets the status quo for both employers and employees by invalidating the business practice of offering ERISA-covered benefits as consideration for an employee's release of potential legal claims. When retiree health coverage is reduced or eliminated, employees' retirement security is thrown into jeopardy due to the high cost of replacement health coverage -- if it can be obtained at all.

[3/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

I. THE SIXTH CIRCUIT DECISION UPSETS THE STATUS QUO FOR BOTH EMPLOYERS AND EMPLOYEES BY INVALIDATING THE BUSINESS PRACTICE OF OFFERING ERISA-COVERED BENEFITS AS CONSIDERATION FOR AN EMPLOYEE'S RELEASE OF POTENTIAL LEGAL CLAIMS.

The Sixth Circuit held that the bilateral contracts providing enhanced ERISA benefits to 50,000 early retirees are not enforceable. This holding wreaks havoc with the current business practice of using enhanced ERISA benefits as consideration for an employee's release of potential legal claims. Indeed, General Motors' Vice President of Corporate Personnel, Richard O'Brien, considered early retirement incentives "a 'win-win' situation 'for the corporation and the employee.'" (Appx. at 186a).

Because employees will not agree to waive their legal rights for petty consideration, employers which are unable, or unwilling, to pay significant amounts out of their general assets will be unable to obtain releases from employees. *See generally Lockheed Corp. v. Spink*, 517 U.S. 882 (1996). Moreover, employees will not gain the advantages of the receipt of these enhanced benefits. Accordingly, this decision upsets the status quo for both employers and employees and undermines the effectiveness of workforce reduction programs.

During the past decade and a half, employers (including GM) have frequently relied on early retirement incentive programs as a means of reducing their workforce size. Since 1986 numerous groups have surveyed businesses to determine

the frequency of the use of such programs.[4/] These early retirement incentive programs may include a variety of incentives such as additional or enhanced pension benefits, retiree health insurance, lump sum cash payouts and Social Security "bridges," in which the employer fills the gap between the date that the employee ceases to receive pay checks and the date of the employee's Social Security and Medicare eligibility. Shalowitz, *supra*, at 3; Paul Fronstin, Employee Benefit Research Inst., *Employee Benefits, Retirement Patterns, and Implications for Increased Work Life*, at 7 (EBRI ISSUE BRIEF NO. 184, Apr. 1997) ("continued insurance benefits may be offered to retire early").

Indeed, not only have businesses used early retirement incentive programs to reduce the workforce, but they have

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[4/] Charles D. Spencer, SPENCER'S RESEARCH REPORTS § 111.02-1 (July 1987) (24% of 189 corporations offered early retirement incentives); Hewitt Assocs., PLAN DESIGN AND EXPERIENCE IN EARLY RETIREMENT WINDOWS AND IN OTHER VOLUNTARY SEPARATION PLANS 1 (1986) (one-third of more than 500 corporations used exit incentive programs in the past 5 years); Charles Betley, Employee Benefit Research Inst., *Trends and Issues in Early Retirement* (EBRI ISSUE BRIEF NO. 103, June 1990) (66% of 145 companies contacted offered early retirement incentives during the previous 6 years); Seymour LaRock, *Both Private and Public Sector Employers Use Early Retirement Sweeteners*, EMPLOYEE BENEFIT PLAN REV., Aug. 1992 at 14 (13.2% of 362 employers offered early retirement incentives in 1991; one-third that had not offered such an incentive had made offer in the preceding 10 years); Deborah Shalowitz, *As Recession Drags On, Employers Take a Shine to Window Plan Options*, BUSINESS INSURANCE, Sept. 7, 1992, at 3-4 (38% of 50 large companies offered an early retirement incentive in 1990 or 1991); Fran Hawthorne, *Rigging the Early Retirement Game*, INSTITUTIONAL INVESTOR, May 1, 1993, at 79-80 (40% of 400 companies offered early retirement incentives); Seymour LaRock, *Early Retirement Incentives in 1995: More Takers for Fewer Offers*, EMPLOYEE BENEFIT PLAN REV., Sept. 1996, at 54 (10.8% of mid-size to large private sector employers made early retirement offers).

been forthright about their need for finality and thus their need for the enforceability of bilateral contracts. In their *amici curiae* brief before this Court in *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998), three business groups -- the Equal Employment Advisory Council, Chamber of Commerce and Edison Electric Institute[5/] -- recognized the importance of bilateral contracts in the form of a promise of retiree health insurance or other enhanced benefits in consideration for the employee's execution of a release of potential legal claims.

> When implementing workforce reductions, many employers offer special, added benefits to departing employees who agree to release legal claims they might otherwise assert against the employer. Individuals who voluntarily accept this option by signing general releases receive enhanced severance benefits -- *e.g.*, supplemental cash payments, extended health care coverage, additional pension benefits, and the like -- over and beyond any benefits the employer has committed to provide upon termination of their employment. In return, the employer gains relief from the lingering uncertainties and potential liabilities it otherwise would face until expiration of the filing dates for all possible claims relating to the individual's employment. Because of the significant, mutual advantages they afford to both employee and employers, such release-for-consideration agreements are used widely in implementing workforce reduction programs throughout the United States.

[5/] In their Statement of Interest, these three groups state that they represent over three million business entities.

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Thus, business recognizes the importance of the enforceability of releases and the security they bring. Even General Motors itself has argued, successfully, that early retirement releases are enforceable because they are binding bilateral contracts -- precisely the opposite of the position that it took in this case. *See White v. General Motors Corp.*, 908 F.2d 669 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); *Seward v. B.O.C. Div. of General Motors Corp.*, 805 F.Supp. 623 (N.D. Ill. 1992).

The Sixth Circuit decision completely dismantles the common business practice of using enhanced ERISA benefits as consideration for an employee's release of potential legal claims -- a practice that Congress and this Court have sanctioned.[6/] Employers lose protection from lawsuits, and employees lose the guarantee of lifetime health benefits.

II. RETIREES' SECURITY WILL BE SHATTERED IF EMPLOYERS ARE PERMITTED TO BREACH THEIR PROMISES TO PROVIDE RETIREE HEALTH BENEFITS.

Just like employers, employees also want the certainty of knowing that the agreement that they signed promising retiree health benefits will be enforceable. Losing access to

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[6/] Older Workers Benefit Protection Act (OWBPA), Pub. L. 101-433, 104 Stat. 978 (1990); *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

employer-promised health coverage after giving up their jobs and current benefits in exchange for that coverage will shatter many employees' retirement security.

A. Employer-sponsored Health Insurance Entices Employees to Give Up Their Jobs and Current Benefits.

Retiree health insurance is one of the most popular "carrots" employers dangle to entice employees to leave the workforce early. Many employers find that employees will not accept an early retirement incentive unless enhanced medical benefits are provided. Some benefit consultants maintain that without retiree health coverage an early retirement incentive plan will not be successful. Deborah Shalowitz, *As Recession Drags On, Employers Take a Shine to Window Plan Options*, BUSINESS INSURANCE, Sept. 7, 1992, at 3, 6. Quite simply, these consultants recognize that medical premiums are too expensive for individual employees to pay, especially if they are not yet eligible for Medicare, making them valuable enough to entice employees to give up their jobs and current benefits for the employer's promise. *Hang Tough, or Take the Gold Watch Early?*, FORBES, May 5, 1986, at 158.[7]

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[7] The use of extended health coverage in early retirement incentives has been consistently used to "sweeten" the retirement package. Seymour LaRock, *Early Retirement Incentives In 1995: More Takers For Fewer Offers*, EMPLOYEE BENEFIT PLAN REV., Sept. 1996 at 54, 56 (at least 40 companies provided some type of extended group health coverage to early retirees, with 20 companies providing coverage for the life of the employee and 13 providing coverage until the employee became eligible for Medicare); Seymour LaRock, *Both Private and Public Sector Employers Use Early Retirement Sweeteners*, EMPLOYEE BENEFIT PLAN REV., Aug. 1992 at 14, 19 (41 out of 50 employers provided some type of extended group health coverage to early retirees with 26 of 41 provided coverage for the life of the employee).

Numerous studies, employing a variety of research methodologies, confirm that employees who have, or believe they have, retiree health coverage are more likely to retire before age 65 than are employees who do not expect such coverage. *See* U.S. General Accounting Office, RETIREE HEALTH INSURANCE: EROSION IN EMPLOYER-BASED HEALTH BENEFITS FOR EARLY RETIREES 8 (GAO/HEHS-97-150, July 1997); Fronstin, *supra*, at 8-9 (after analysis of five studies, concluded that "individual retirement decisions are strongly responsive to the availability of retiree health insurance"); *accord,* Joseph F. Quinn & Richard V. Burkhauser, RETIREMENT PREFERENCES AND PLANS OF OLDER AMERICAN WORKERS 17, 18 (1990) (employees with continued coverage are more likely to retire before age sixty-five). Indeed, there is no evidence to suggest otherwise.

Not surprisingly, employees themselves view the provision of retiree health benefits as important in the decision to give up their jobs and accept early retirement incentives. This is especially true for lower to middle income employees. In response to the Gallup Poll question -- would you retire before you become eligible for Medicare if your employer did not provide health benefits for retirees? -- only 35% of nonretired respondents answered yes, and as expected, the lower the employee's income, the more likely he or she was to answer negatively. Employee Benefit Research Inst., PUBLIC ATTITUDES ON MEDICARE & RETIREE HEALTH, at 16 (1993).[8]

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[8] *Accord*, Quinn & Burkhauser, *supra*, at 17, 18 (concluding that "[p]eople's behavior depends on the financial conditions they face"); University of Rochester and Regional Council on Aging, CONSEQUENCES OF EARLY RETIREMENT WITH INCENTIVE PROGRAMS: A REPORT FOR AARP'S PUBLIC POLICY INSTITUTE (1989) (finding that continuation of health benefits was major factor in an employee's retirement decision).

Clearly, employer-sponsored retiree health benefits are very important -- and frequently determinative -- in an employee's decision to give up his or her job and current benefits and accept an early retirement incentive.

B. When Employers Break Their Promises, Retirees Are Faced with Higher Insurance Premiums and an Inability to Obtain Health Care Coverage, Leaving Them Vulnerable to High Medical Costs.

Because eligibility for Medicare does not generally begin until age sixty-five and older Americans tend to consume more medical services, thus making their health care costs more expensive, lost access to employer-promised health care coverage results in major problems for retirees and their dependents. These problems are (1) higher costs in purchasing any health care coverage on their own; (2) less comprehensive, or no, coverage, due to higher costs; and (3) inability to obtain non-restricted health care coverage due to pre-existing conditions. *See generally* U.S. Government Accounting Office, *supra*, at 1, 2; Fronstin, *supra*, at 5, 8-9.

The retired employees and their dependents may struggle to pay for health care, even if they are fortunate enough to find an insurance company which will cover them. For example, an individual who had been promised retiree health benefits from Pabst Brewing Company would have had to pay $8200 annually in the individual insurance market to replace these benefits.[2/] U.S. General Accounting Office, *supra*, at 1, 3. Even those retirees with Medicare coverage rely on

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[2/] In 1995, the median annual income from a private pension annuity for men, age 65-67, was $8,580. Employee Benefit Research Inst., EBRI DATABOOK ON EMPLOYEE BENEFITS, *Retirement Annuity and/or Employment Based Pension Income Recipiency*, at 65, tbl. 8.1 (4th ed. 1997).

employer-promised benefits to fill the gaps in Medicare coverage, such as deductibles and co-payments. *Id.*

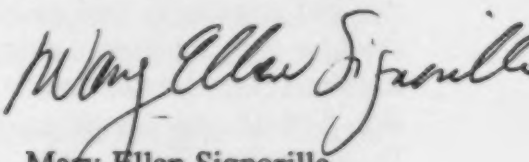
Especially hard hit are those retirees who need medical insurance the most -- those with pre-existing medical conditions. These retirees will most likely find that they cannot obtain coverage, leaving them vulnerable to costly medical expenses, and possibly wiping out their personal savings and sending them into poverty. John Mintz & Kathleen Day, *Health Care's Painful Changes: More Retirees Are Left in the Lurch as Firms Slash Health Coverage*, WASHINGTON POST, Feb. 28, 1993, at H1; Albert B. Crenshaw, *Fewer People Opt for Early Retirement; Pension Shifts, Economic Worries Are Key Factors*, WASHINGTON POST, June 13, 1993, at H3.

Even if these retirees can obtain health coverage, this coverage may permanently exclude an existing health problem, which typically is the primary reason that retirees and their families need the health coverage. Moreover, the cost to cover the pre-existing condition may be prohibitive. Health insurance carriers have declined coverage for individuals with diabetes; excluded coverage for asthma, ulcers and glaucoma; and charged higher premiums for plans that covered problems like anemia and arteriosclerosis. *See generally* U.S. General Accounting Office, *supra*, at 13.

CONCLUSION

AARP supports Petitioner's writ of *certiorari* to the Sixth Circuit and respectfully urges the Court to grant review of this case.

Respectfully submitted,



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